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Pragmatism and Torture

From Moral Absolutes to Constitutive Rules of Reasoning

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Abstract

This paper seeks to contribute to the growing literature on pragmatism in political theory by revisiting the role of moral absolutes in politics. More specifically, I propose the idea that pragmatism can support a particular defence of the ban on torture. In contradistinction with deontological accounts, I will argue that the principles underlying the ban on torture should not be construed as transcendental values that impose external constraints on political action, but as constitutive rules that emerge from, and are sustained by, a web of intersecting social practices. While pragmatists vehemently reject the introduction of absolutes in politics, their anti-foundationalist conception of reasoning crucially hinges on the sustainability of *adjustable banisters* along which judgments are formed. The paper suggests that the torture prohibition ought to be re-interpreted as one such banister.

I. Introduction²

Over the past 10 years, the reception of pragmatist themes in political theory has been steadily increasing. This paper seeks to contribute to the growing literature by examining the role of moral absolutes in politics from a pragmatist perspective. Its main purpose is to contribute to a better understanding of pragmatism via an exploration of recent controversies around torture as a case study.

Can one be a *pragmatist* about torture without becoming *pragmatic* about it? Can one cultivate a fallibilistic mentality with regard to all deliberative processes without endorsing the position of those who invoke the “ticking-bomb scenario”, advocating that sometimes torturing a suspect is simply the lesser evil? This paper will answer in the positive. In doing so, I demonstrate that pragmatism’s reluctance to permit moral absolutes in the political forum should not be equated with an acquiescent attitude towards torture. While pragmatism cannot support an absolute ban on torture, it may furnish a contingent argument for such a ban that is of considerable strength.

As I shall maintain, pragmatists are correct in stressing the dangers of absolutes in politics; yet, their fallibilistic mentality regarding all processes of reflection and deliberation commits them also to endorsing relatively, not absolutely, firm principles of social and political organization. The paper hence extends an invitation to envisage the torture prohibition not as a transcendental norm that imposes external constraints on the behaviour of individual or collective agents, but rather as a constitutive rule of reasoning, emerging from, and sustained by, an intersecting web of social practices.

The majority of those who have grappled with torture apologists invoke inviolable goods, such as human dignity, in order to undermine the utilitarian calculus set into motion by thought experiments, like the “ticking-bomb scenario” (for an alternative,

virtue-ethical rebuttal of torture apologists see: Gordon, 2014). Whether they subscribe to a Kantian system of secular morality (Habermas, 2010), or to a religiously inspired code of ethics (Luban, 2009), these champions of an absolute ban on torture claim that not even the highest ends (such as saving the innocent) license the use of all means (such as torturing the suspect).

These attempts to respond to the consequentialist challenge have been fruitful in many respects, and I do not intend to detract from their accomplishments. However, the initial intuition behind this paper is that deontological accounts are likely to run into serious problems once they confront consequentialists on their own playing field. Instead of accepting the challenge on the terms set by consequentialists, the suggestion is to shift the debate towards examining what is actually at stake with the torture debates. To motivate this shift in attention is the paper's ambition.

In the following, I pursue two more specific goals: (1) I aim to construct an argument for the ban on torture from pragmatist premises. In working through the controversy around the prohibition, focusing in particular on the ticking-bomb scenario, the paper therefore hopes to push the boundaries of what political theorists in the pragmatist tradition feel confident engaging with. While recent discussions have mostly revolved around pragmatism's potential to renew democracy (Talissee, 2014), it is perhaps time to expand the horizon of problematizations and study in which other areas of normative political theory it can be put to use.

(2) Simultaneously, the paper seeks to outline a defence of the torture prohibition that is based on the notion of "constitutive rules of reasoning", developed through an engagement with Robert Brandom's work. It hence proffers a justification for the ban that is not grounded in some form of deontology, but rather in the social practices

shared by a community of reasoners. In this sense, the second goal of the paper is decidedly revisionist – it strives to shift the academic debate towards a new way of seeing the ban on torture as a constitutive element of liberal democracy.

The argument proceeds as follows. Section II presents a first version of the pragmatist case against moral absolutism. In concentrating on the work of Richard Bernstein, I single out one author who has highlighted the detrimental effects absolutes can have on public deliberations. I also point to some inherent issues with the wholesale rejection of absolutes. Section III then gives an account of recent debates around torture in normative political theory. I will rehearse these debates by foregrounding the divide between absolutist and consequentialist positions and by scrutinizing a recent taxonomy of how absolutes function. Finally, section IV probes the pragmatist tradition's potential to oppose torture. The main source of inspiration for this section will be Brandom's account of reasoning as a social activity.

This introduction cannot end without a caveat about the essay's limitations: since my main goal is to widen the scope of pragmatism, much interpretive energy will be dedicated to close readings of authors within this tradition. As a consequence, the examination of the post-9/11 torture debates will, by necessity, have to remain limited, concentrating entirely on questions of justification and leaving aside several significant issues, such as the psychological and somatic trauma suffered by torture victims (Campbell, 2007; Mollica, 2004), or the historical transformations of torture as a tool of interrogation (Langbein, 1977). Obviously, I do not wish to suggest that these issues are irrelevant for the topic under scrutiny here; a holistic approach to the phenomenon of torture would certainly have to pay close attention to all these

dimensions. However, since such a broad approach cannot be realized in one essay alone, I will confine myself here to exclusively discussing the ticking-bomb scenario.

II. The *Prima Facie* Case against Moral Absolutes

Before turning to the pragmatist case against moral absolutes, a number of preliminary clarifications seem necessary. When referring to pragmatism as a set of philosophical ideas, it is vital to stress that it would be misleading to celebrate a “revival” of pragmatism in our days. The revival narrative is premised on the idea that classical pragmatism had been fully eclipsed by 20th Century analytical philosophy. (Talissee and Aikin, 2011) Recent scholarship, though, has stressed that this image is largely overdrawn. It has also been argued that referring to “pragmatism” in an unspecified manner is rather futile: neither did the “founding fathers” of pragmatism – William James, Charles Sanders Peirce and John Dewey – share a whole lot of common ground, nor can it be said that recent appropriations of traditional themes consistently follow the same lines of exegesis. (Talissee, 2007, p. 21)

But internal strife should not distract us from isolating family resemblances, a unifying *ethos*, between otherwise disagreeing pragmatists. (Bernstein, 1989) Let us highlight three elementary views to which all pragmatists appear to be committed (Knight and Johnson, 2011, pp. 26–28): (1) pragmatists endorse fallibilism, that is, the idea that all opinions are in principle open to revision and critique. No matter how deeply held a conviction is, pragmatists submit that any belief could and should be changed in view of new deliberations and reflections; (2) at the same time, pragmatists embrace anti-scepticism, in the sense that doubt can never be all-embracing. It is impossible, on a pragmatist account, to question all beliefs at once; and (3) pragmatists are consequentialists in the general sense of looking at the real

effects ideas have on our actions.³ Thus, they believe that “practice is primary in philosophy” (Putnam, 1994, p. 152).

With this broad picture in mind, I now want to concentrate on one contemporary author: Richard Bernstein. (see representatively: 1992, 2010, 2013) his discussion of absolutes is not persuasive on all accounts, as shall become clear towards the end of this section, it opens up an interesting perspective that will help us shed light on the torture prohibition. Bernstein attacks what Dewey called the “quest for certainty” (Dewey, 1998):

Dewey understood that at times of deep uncertainty, anxiety, and fear, there is a craving for moral certainty and absolutes. At such times there can be a desperate search for metaphysical and religious comfort. But this is precisely what we must *resist*. [...] The pragmatists exposed and sharply attacked the seductive but misleading appeal to absolutes, certainty, specious foundations, and simplistic oppositions. But their main positive achievement was to develop a viable critical and fallible alternative. (Bernstein, 2005, p. 26)

This alternative can be found in the “pragmatic fallibilistic mentality”, which opposes dividing the moral universe into easily separable camps. It is worth mentioning that Bernstein’s book was published in the shadow of 9/11 and the ensuing US-led wars in Afghanistan and Iraq. Envisioning global politics through the prism of a clash of civilisations, Bernstein demonstrates, makes it impossible to exercise the faculty of judgment in a nuanced manner. Pragmatists are instinctively disinclined to base judgments on a-historical truths about human nature. When they decide what should be done, they reflect and deliberate in the spirit of fallibilism, thereby acknowledging the openness of all inquiry and the contestability of all claims.

All this will sound persuasive to those who generally subscribe to the view that public debates should be organised in an inclusive way such that all standpoints are heard and none is excluded from the outset. Bernstein asks himself, though, whether the mentality of pragmatic fallibilism is also appropriate for dealing with evil. During the “War on Terror”, many politicians and commentators intimated that we would now be confronted with novel forms of violence that must be met with radically new policy measures. Indeed, the prison camp in Guantanamo Bay was explicitly designed as a space for extraordinary justice, outside of the protective realms of international and domestic law.

What, then, can and should pragmatists say in the face of evil? The worry is, naturally, that their fallibilistic mentality would simply be too weak to stand up against extreme forms of violence. When everything is revisable and open to further inquiry, how could one ever reach a firm stance on highly contested questions, such as how alleged terrorists ought to be treated? In response to the charge that pragmatists are by nature indecisive, Bernstein objects:

It is a misleading caricature of the pragmatic mentality to suggest it calls for endless debate. It is difficult to think of another philosophical orientation that has placed so much emphasis on conduct, practice, and action. There is no incompatibility between being *decisive* and recognizing the *fallibility* and limitations of our choices and decisions. On the contrary, this is what is required for *responsible* action. (Bernstein, 2005, pp. 57–58)

In order to clarify the assertion that decisiveness and fallibility are not mutually exclusive, Bernstein introduces a distinction between two ways of being certain about something: “subjective moral certitude” and “objective moral certainty”. For

Bernstein, the very idea of “objective moral certainty” is profoundly flawed. Pragmatic fallibilism runs all the way through our motivations such that in the end we have no access to any form of “objective moral certainty” at all. There simply are no convictions, no matter how deeply felt, that could be persistently isolated from inquiry and critique.

On this view, the main problem with absolutes is that they inhibit reflection and deliberation. Once the appeal to such an absolute is made, nothing can be said in response, and the discussion is over. If political actors call upon absolutes, they corrupt politics because their appeal to “objective moral certainty” makes any form of compromise impossible. Drawing a firm and impenetrable line between good and evil undercuts the capacity to reach out across the trenches for a settlement. Of course, more often than not that is precisely what appeals to absolutes are supposed to do: avoiding the perils of an appeasing, and perhaps rotten compromise by presenting one’s own position as immovable.

Is such a generalized suspicion of absolutes internally consistent? From within the pragmatist tradition, an initial rejoinder might be that Bernstein’s account remains incompletely theorized because it conflates two senses of absolutes in politics: “infallible” and “without exception”. As Richard Rorty has notoriously argued, one may fully accept the fallibility of one’s convictions without granting that these convictions ought to be sacrificed in extraordinary circumstances. This is the reason, after all, why he calls himself a “liberal ironist” (Rorty, 1989, p. 73). Such a liberal ironist might thus be strongly committed to the torture prohibition, whilst simultaneously acknowledging the contingency and metaphysical groundlessness of the values underpinning the ban. Bernstein himself alludes to this possibility when he

insists that decisiveness and fallibility may go hand in hand; yet, he fails to specify his rather coarse-grained picture of absolutes further.

Rorty is right to disambiguate the notion of an absolute. My main concern with his version of pragmatism, however, is that it pays insufficient attention to the social character of reasoning. “Liberal irony” remains very much an individual virtue, cultivated within the private realm (Rorty, 1989, p. 83), but with little bearing on the collective sphere, where “hope” would be the appropriate political attitude. (Koopman, 2006) Although Rorty’s programme evidently contains valuable resources for a pragmatist approach to the torture prohibition, his sharp distinction between private and public undermines its overall usefulness for our topic, and perhaps for political theory in general. (Haber, 1993) This is why the main inspiration for the following pages comes from the work of a student of Rorty’s, Robert Brandom, who hones in much more on the socially constructed rules by which deliberators hold each other accountable.

III. Mapping the Torture Debates

Before turning to Brandom, we need to look more closely into recent debates around torture. While I will exclusively focus on academic discourse, it is necessary to keep in mind that the current resurgence of talk about torture has been embedded in wider public controversies. Although it would exceed the scope of this paper to reconstruct the societal context of this development, it should be clear that, after 9/11, it became quite suddenly attractive for academics from various disciplines to openly ask whether torture should be considered illicit under all circumstances. In other words, it became possible to answer the question “when is torture right?” (McCready, 2007)

with a hesitant “sometimes”. (Cole and Sands, 2009; Greenberg and Dratel, 2005; Sands, 2008)

It is no secret that many democracies commonly considered promoters of human rights have been busy developing new forms of “clean” torture. (Rejali, 2007) But what seems rather unique in the case of the American discussion is how much willing support the Bush administration received from scholarly circles, frequently through the introduction of hypotheticals. (Scheppelle, 2005)

Roughly speaking, two argumentative strategies were employed to weaken the provisions in international and US law prohibiting torture. In terms of philosophical doctrines from which these strategies drew inspiration, we may discern various traditions, from act-utilitarianism (Allhoff, 2012), to “threshold deontology” (Moore, 1989), to rights-based reasoning (Steinhoff, 2013). However, and to complicate things further, it must be stressed that these philosophical doctrines are internally heterogeneous, which is why we can also find argument *against* torture grounded in “threshold deontology” (Kramer, 2014) as well as in consequentialism (Arrigo, 2004). Space constraints prevent me from engaging in detail with all these approaches. Therefore, this paper’s exclusive focus will lie on consequentialist arguments, and how one may respond to them.⁴

III.a Two Argumentative Strategies Against the Ban on Torture

The first strategy involved the suggestion to abolish the prohibition of torture *tout court*. Alan Dershowitz has been the most outspoken proponent of the idea that, in a liberal democracy, judges should be allowed to issue “torture warrants” in exceptional circumstances. (Dershowitz, 2002, pp. 132–163) The objective of these warrants

would be the judicial oversight of torture. Judges would then be in charge of rendering torture practices visible and holding interrogators accountable. Since interrogators would resort to torture in any case when the lives of many civilians were endangered, it would be prudent to grant judges the right to decide when to apply torture. (Dershowitz, 2003) Dershowitz, and others arguing in a similar vein, found that, in an era of asymmetrical warfare and counter-terrorism, a legal regulation of torture would simply be the lesser evil. (Moher, 2003)

The second strategy involved the conceptual creation of a sub-category of violence that, while being sufficiently harsh to “break” a prisoner into submission and to release vital information, would still fall short of torture. This form of severe coercion has been called “torture lite” (see for example: Gross, 2010, p. 127). Jean Bethke Elshtain, a prominent defender of this notion, surmised that the word “torture” had so far been insufficiently disambiguated – there is a morally relevant discrepancy between “a beating to within an inch of one’s life” and a “slap in the face”. Bringing these two forms of coercion under the umbrella of “torture” would make “mincemeat of the category” (Elshtain, 2004, p. 79). Hence, the suggestion is to parse the definition of torture such that severe coercion would be exempted from the absolute prohibition.

Both strategies have been met with strong criticism. The proposal that regulating torture through judicial oversight would be the lesser evil was discarded as a dangerous step towards barbarism. (Žižek, 2002, pp. 107–110) The proposition that some forms of severe coercion, which have hitherto been covered under the torture prohibition, should be tolerated in times of crisis was rejected on the ground that the

category of “torture lite” is nothing but a smokescreen, set up to distract the public from the insidiousness of torture practices. (Wolfendale, 2009)

III.b. The Role of Absolutes in the Torture Debates

In the course of the torture debates, the view that doing what is wrong might sometimes be right, and even obligatory, surfaced visibly in the context of the ticking-bomb scenario (for a comprehensive account see: Brecher, 2007). The generic setup of the thought experiment is familiar: “(1) the lives of a large number of innocent civilians are in danger; (2) the catastrophe is imminent, therefore time is of the essence; (3) a terrorist has been captured who holds information that could prevent the catastrophe from occurring.” (Bufacchi and Arrigo, 2006, p. 358) The standard argument goes that, in such a situation, interrogational torture would be permissible to extract life-saving information from the terrorist. The underlying logic stipulates that the consequences of not torturing the suspect “would be horrendous, involving so much human suffering – death, mutilation, loss of loved ones – it must override the reasons, important as they may be, [...] not to cause much pain and suffering to one single person” (Ginbar, 2008, p. 28).

Needless to say, defenders of the hypothetical have come under attack from various sides. Critics have pointed out that the thought experiment is in its abstractness deceptive, that it leads to a slippery slope towards ethical insensitivity and that it remains predicated on impossible epistemological standards as regards the knowledge regime of the would-be torturer. (Luban, 2007; Opatow, 2007; Shue, 2006)

The discussion around the hypothetical touches on the broader question how absolutes work in the torture debates. Jeremy Waldron (2011) provides us with a highly useful

taxonomy, outlining various responses to the consequentialist challenge. The rhetorical objective of the ticking-bomb scenario is clearly to encourage the absolutist to succumb to a “utilitarianism of extremity”:

To meet this challenge, then, we can’t just keep coming up with better and better (or rather more and more horrific) characterizations of the allegedly forbidden act. Instead we need to explain how those who take seriously the alleged prohibition are to be relieved of the burden of responding to the cases on the other side, cases that seem to involve exactly the same concerns as those that motivate the absolutism. (Waldron, 2011, p. 25)

Waldron identifies five different ways in which this challenge could be met. The first involves investing one’s trust into a transcendent authority who would ultimately assess the consequences following from an absolutist position. (Waldron, 2011, pp. 25–29) A second way of engaging with the consequentialist challenge would be to argue that the costs for sticking to an absolutist position should be attributed to those who have caused the situation that made resorting to a “lesser evil” appear inevitable. Accordingly, choosing not to torture might lead to innumerable deaths in the “ticking bomb” scenario – but it is, in the last instance, the terrorist who shoulders the responsibility for the ensuing carnage.

A third possibility to justify the absolutist position involves the notion that any state of affairs resulting from an immoral act, such as torturing, would be fatally “tainted” by this very act. When the state permits torture in order to protect its citizenry, the gained protection is problematic from the outset because it builds on some primordial violence. Fourthly, Waldron suggests that an absolutist could appeal to the rules of a game as being prior to the goals to be achieved through playing the game. (Waldron,

2011, p. 35) He shows that, on this defence of absolutes, any deviation from the rules for the purpose of achieving societal goals would fatally undermine the way the game is played. Making an exception for torture in exceptional circumstances changes the game altogether, on this account. Waldron calls the final riposte to the consequentialist challenge “threshold deontology”. The threshold deontologist accepts the importance of moral absolutes – up to a certain point. In extreme situations, the argument goes, we are required to recur to utilitarian calculations that would override rights-based constraints on political action. (Waldron, 2011, p. 40)

Waldron provides us with diagnostic tools for screening the diverse arsenal of consequentialist arguments. Yet, it comes as little surprise that a genuine line of defence is amiss in this taxonomy. One conclusion I would like to draw – one that Waldron himself does not share, though – is that defending the ban on torture on deontological grounds is bound to fail once we allow consequentialists to pursue their agenda, by designing thought experiments against which the absolutist must necessarily appear feeble. So, instead of permitting the conjurer of thought experiments to set the terms of the discussion, it might be more prudent to stress the context in which the torture debates have been taking place. This is the purpose of the next section.

IV. Towards a Critical Embrace of Constitutive Rules of Reasoning

Everything discussed so far appears to indicate that pragmatists must side with those who argue that torture cannot be prohibited under all circumstances. At first sight, it seems that the injunction against absolutes in the political forum is completely incompatible with a ban on torture. There is something to be said in favour of this assessment; yet, I would like to resist it by attempting to propose a different route

towards supporting the torture prohibition, one that is consonant with pragmatism's fallible as well as anti-sceptical stance. To sustain this claim, I shall demonstrate that the principles underlying the ban on torture can be conceived of in a manner different from Bernstein's: not as transcendental norms that defy discussion and revision, but as normative commitments that are deeply embedded in the cultural and social practices of liberal democracy.

I start by revisiting Robert Brandom's work, which offers a persuasive alternative to Bernstein's account of absolutes. (Brandom, 1994, 2000, 2009, 2010) Brandom builds in many ways on the heritage of American pragmatism, whilst significantly transforming the research programme outlined in section II. His approach to semantics is pragmatist: he believes it is possible to elucidate the meaning of words by looking at the practices of competent language-users. Brandom sets his view apart from a representational one, according to which the conceptual content of words is established independently of their use. This method involves describing assertions first and foremost as social activities. Brandom emphasizes the rational character of these activities when he highlights that any discourse has at its core the "game of giving and asking for reasons" (Brandom, 1994, p. xviii). Thus, Brandom's understanding of rationality is interactive and dialogical. Reasoning is a social practice with a normative impetus. To raise a claim in a conversation implies entering into the game of reasoning – the partners in discourse can assess and challenge the claim, or offer a countervailing claim.

All this will sound familiar to those acquainted with the basic structure of deliberative theories of democracy. But Brandom departs from these theories when he tries to make the normative character of discursive practices explicit. He distinguishes

between two kinds of normative status: commitment and entitlement. Being committed or entitled to something is a social activity that only makes sense to the extent that discourse partners recognize these normative statuses. Here, Brandom vehemently rejects the idea that commitments or entitlements could be held in the absence of actual relationships between discourse partners. Once again the dialogical and interactive character of normativity comes to the fore, as the following passage shows:

There were no commitments before people started treating each other as committed; they are not part of the natural furniture of the world. Rather they are social statuses, instituted by individuals attributing such statuses to each other, recognizing or acknowledging those statuses. (Brandom, 1994, p. 161)

From this passage it should be evident that Brandom paints a thoroughly social picture of normativity. Language use in general can then be characterized as involving this “game of giving and taking of reasons”.

Does this model contain resources for criticizing normative statuses? Given that pragmatists grant priority to practices, the doubt may indeed arise whether one can ever stand outside those practices in order to transform them. Brandom certainly seems to insinuate that we cannot leave the game of reasoning behind – we cannot simply step outside of those practices we share with other reasoners. Does this force us to accept a form of “conventionalism” about norms, whereby the mere existence of a practice is proof of an underlying norm?

It is possible to debunk this assumption by demonstrating that all discourses occur within a web of intersecting social practices. (Fossen, 2012) This implies that we may

draw on resources from within the practices we are engaged in to revise existing norms. While pragmatists argue that it is impossible to call into question all beliefs at the same time (hence their anti-skepticism), they are equally convinced that social practices are revisable through immanent criticism.

Brandom's view of reasoning thus shares many features with Bernstein's account of pragmatic fallibilism. Where he departs from Bernstein's position is in the elaborate and sophisticated account of the process of giving and taking of reasons. This process makes it possible to assign responsibility to those who are entangled with each other in the game of reasoning. This entanglement makes critique and transformation possible: it is precisely because we can hold each other accountable for the positions we take that we are able to change our standpoints.

IV.a Constitutive Rules and the Liberalism of Fear

In what ways, then, does this conception of pragmatism relate to the torture debates? Brandom's approach to normativity is important because it emphasizes the social activity of reasoning, which could not be played out without some binding rules governing the contest between reasoners. If we start from pragmatist premises, the prohibition's purpose is to sustain and affirm normative commitments, whose stability is central to reflection and deliberation. Reasoners, in Brandom's sense, are in need of banisters that guide their discourses when they engage with each other; but these are *adjustable banisters* in that they reflect historically and culturally contingent principles that remain altogether accessible to future revisions.

The proposal is, hence, to re-interpret the ban on torture as a rule of reasoning, rather than as an absolute. To construe the torture prohibition as a "rule" signals its potential

revisability, whilst at the same time stressing its robust nature. What exactly do I mean by “rule” in this context, more concretely? To further clarify, let us distinguish between two types of rule in social interactions. Regulative rules apply in situations where a practice exists independently from the rules that govern it.⁵ (Searle, 1969, pp. 35–37) Constitutive rules, on the other hand, apply in situations where the rules themselves create the practice they govern. Chess is a typical case of a game whose rules are constitutive. Whereas the rules of chess also dictate the behaviour of the players, they do more than mere regulation – without them there would be no game we call chess. Applying this distinction to the torture debates, my argument is that the ban on torture must be considered a constitutive rule governing the game we call “liberal democracy”. The ban articulates a norm whose existence is necessary for, and foundational to, liberal democracy.

Space constraints prevent me from painting a complete picture of “liberal democracy”, but a few basic features need to be outlined. One promising way of characterizing liberal democracy is to envisage rights as “trumps” that countervail majoritarian decisions generated through democratic procedures. (Dworkin, 2009) Today, this is a widely held interpretation of democracy itself – that the will of the majority must be constrained by laws that lie beyond the will of the majority. (Talisie, 2007, p. 29) The problem with this interpretation, however, is that the image of “trumps” has connotations that are inimical to the fallibilistic mentality sketched above. Hence, pragmatists cannot espouse this rights-based reading of liberal democracy: a “trump” is just another word for an absolute, after all.⁶

If a “rights-as-trumps” understanding of liberal democracy seems inopportune from the point of view of pragmatism, what other options do we have? A more auspicious

perspective would be to draw on the notion of a “liberalism of fear”. (Shklar, 1982) On this account, liberalism should primarily be seen as a project of avoiding and containing fear, “which is created by arbitrary, unexpected, unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime” (Shklar, 1989, p. 29).

Cruelty as the *summum malum* of liberalism does not necessarily prepare the ground for a social project in the broader sense; it merely enunciates a “first principle, an act of moral intuition based on ample observation, on which liberalism can be built” (Shklar, 1989, p. 30). The advantage of this parsimonious account of liberalism is its “thinness”: instead of proclaiming a list of inviolable goods, such as dignity, it posits avoiding fear as a pre-condition for living a dignified life. The fear of systematic cruelty is such a universally shared practice among human beings that it requires little, or perhaps even no argument at all, to justify it.⁷

Against the backdrop of such a parsimonious image of liberal democracy, it becomes clear what is at stake in the torture debates: the essence of a culture rooted in the fear of cruelty. Viewed from this angle, the debate about the prohibition of torture looks rather different from how Waldron envisaged it – it turns around an essential feature of liberal democracy, the elimination of which would render the very phrase “liberal democracy” meaningless.

While one might object that torturing suspected terrorists can in fact enhance the sense of safety enjoyed by the citizenry – after all, a threat might be averted through the interrogation – this rejoinder fails to properly conceive of the relationship between the torture prohibition and the liberalism of fear. When someone is tortured, pain is

deliberately inflicted so as to break his or her spirit, presumably to release vital information that might prevent much larger harm. The victim of torture becomes dominated in such a way that his or her dignity is entirely obliterated. Torture as extreme domination is therefore different from ordinary coercion, where the subject's agency remains intact (Wisnewski, 2010, p. 64). Or, to put it otherwise, "[t]orture [...] is a microcosm, raised to the highest level of intensity, of the tyrannical political relationships that liberalism hates the most." (Luban, 2007, p. 251)⁸

By tying the ban on torture to the liberalism of fear, I do not wish to suggest that actually existing liberal democracies would instinctively shy away from torture. On the contrary, if anything is to be learnt from recent revelations about the vast scale of abuse in US detention centres, it is surely that the torture prohibition has been much less robust than one would have hoped. My argument is, rather, that subverting the ban on torture ultimately leads to the disintegration of the very culture that forms the basis of liberal democracy.

Here, the analogy with playing a game governed by constitutive rules is illuminating. When players start to persistently ignore and break the rules of a given game, this may trigger a general demise in how the game is perceived. Viewed from this vantage point, it becomes clearer that the torture prohibition cannot be presented in isolation from other social practices that together form a web in which reflection and deliberation occur.

This idea has implications for how we assess the consequentialist challenge with which we saw Waldron grappling. The crucial move of the consequentialist critics is to *decontextualize* the torture prohibition such that the decision whether to resort to torture becomes a singular, and even tragic-heroic act: the ticking-bomb scenario is

the paradigmatic case of a hypothetical in which the lives of innumerable innocent people depend on an agent's willingness to perform an isolated horrific deed. As such, it presents us with an extreme case of short-termism where the utilitarian calculus applies solely to the one moment of interrogational torture – the long-term effects of abolishing the torture prohibition, however, do not figure in the debate. (Arrigo, 2004; McDonald, 2010; Wolfendale, 2006)

Once we acknowledge the centrality of the torture ban for the liberalism of fear, it transpires that it is the defenders of the ticking-bomb scenario who are trying to control the debate: such thought experiments intend to make a nuanced discussion impossible – anything but torturing the terrorist in the face of such overwhelming loss of innocent lives must appear frivolous. In a significant sense, the consequentialist challenge is thus manipulative: deliberately or not, it calls into question, and ultimately demolishes, commitments that are deeply embedded in the political culture of liberal democracies. (Fried, 2014)

When claiming that the ticking-bomb scenario is problematic in that it negatively affects our ability to reflect and deliberate, I do not mean to suggest that the academic debate about this hypothetical has stalled. On the contrary, very few topics in recent years have received as much attention in political theory as the ticking-bomb scenario.⁹ Evidently, there has been an expansion of discourses around the thought experiment and its various incarnations. However, my interest in this imaginary case is normative rather than sociological. In other words, I want to raise the question whether the widespread use of the ticking-bomb scenario has led to an impoverishing of our ethical frameworks, echoing Henry Shue's poignant observation that "artificial cases make bad ethics" (Shue, 1978, p. 141). Once we highlight the effects – whether

intended or not – that the thought experiment may have on its audience, we get a better grasp on its controversial nature.

In sum, this section has demonstrated that Brandom's view of reasoning can provide us with a different perspective on the torture prohibition. By foregrounding the necessity of constitutive rules of reasoning, we are able to construe the ban on torture as a necessary pillar of the game we call "liberal democracy. This view is markedly different from the standard deontological reference to inviolable goods in that it recognizes the rules' revisability.

IV.b. Potential Objections

Before concluding, I need to examine several objections that can be raised against the arguments defended in this paper. The first objection is to do with the *evolution of rules*. One could submit that rules are never set in stone, and that it lies in the nature of a pragmatist account of reasoning that the contenders are permanently involved in the re-negotiation of the rules. One reason why contenders would want to do so is that new possibilities for playing better must be explored. All types of sport undergo such creative changes. (McFee, 2004) Why, then, should we refrain from considering the ban on torture along the lines of Elshtain's attempt to analytically dissect forms of severe coercion?

In response, the Brandomian pragmatist would concede that changing the rules of reasoning is possible and often necessary, but changes can only be instituted through processes of immanent critique. Naming some forms of severe coercion "torture lite" might be charitably interpreted as an effort to initiate such a critique of existing definitions of torture.

But it is striking that very few participants in the debate have been swayed by the proposals of torture apologists, and those who enthusiastically supported the War on Terror, and its security agenda, rather abruptly changed course once they became aware of what enhanced interrogation techniques, such as waterboarding, actually entailed. (Hitchens, 2008) What is more, a recent psychological study of the lasting effects of “torture lite” has proven that these presumably less violent techniques do “not seem to be substantially different from physical torture in terms of the severity of mental suffering they cause, the underlying mechanism of traumatic stress, and their long-term psychological outcome” (Başoğlu, Livanou, and Crnobarić, 2007, p. 277).

So, on the most charitable interpretation, we might acknowledge that some (yet not all) apologists were merely engaged in a *bona fide* act of redescription. But given our current knowledge about the impact of enhanced interrogation techniques, we must surely accept that the very notion of “torture lite” is a myth, and nothing else. (Wolfendale, 2009)

The second objection relates to the *spectre of relativism*. If reasoning is a social activity whose practices are bound up with a community’s customs and mores, it remains unclear, a critic might contend, how the reasoners ought to relate to those who are not members of the community. This objection is particularly poignant with regard to the prohibition of torture: what value does it have if it only applies to a specific group of people, united by a commitment to the liberalism of fear? The notion of “constitutive rules of reasoning” defended in this paper indeed presupposes a web of shared practices, which binds together a liberal-democratic community of reasoners. This makes it by default impossible to appeal to such a rule when dealing with those with whom no practices are shared.

But for the case of the torture debates this “primacy of practice” is perhaps less problematic than it might appear, because it emphasizes the robustness of rules within a community. While the torture prohibition is relativized through my critique of absolutes, the rules of the liberal-democratic game are internally binding. Let us also recall that the torture debates, as reconstructed in section III, took place entirely between parties that all subscribed to the notion that liberal democracy should not be abandoned. None of the participants in the torture debate suggested that the US, or any other country fighting in the “War on Terror”, should forego its credentials as a beacon of freedom and democracy. On the contrary, what commentators like Dershowitz submitted was that it would sometimes be imperative to use torture in order to safeguard freedom and democracy. This paper has demonstrated that the corrosive effects of allowing torture would in fact lead to the destruction of the very culture underlying liberal democracy.

This means that, while my argument has indeed been grounded in a specific belief system geared towards the avoidance of fear, there is no reason to suspect that other justificatory strategies would necessarily have to fail, or yield less persuasive outcomes. While I am convinced that the liberalism of fear lends itself particularly well to the project of upholding the torture prohibition, the framework developed in this paper could undoubtedly be extended to also include narratives stemming from different cultural traditions. (see for example: Twiss, 2007)

The third objection is about the *efficacy of the argument*. A sceptic might be tempted to retort that my point about constitutive rules of reasoning is ultimately misdirected. To accuse torture apologists of “breaking the rules” seems understated, to put it

mildly. It would be more effective to call torture apologists something harsher, to reflect the severity of their transgressions.

In response, the pragmatist could reiterate that the defence of the ban on torture is an indirect one. It simply states that torture apologists “want to have their cake and eat it too” – that is, they intend to remain devoted to the game we call “liberal democracy”, while vigorously attacking one of its constitutive rules. Indirectly, the argument about rule-following can thus be useful in discrediting the symbolic support that the US administration’s policy decisions received from academics.

A fourth and final objection would target the paper’s *position on a meta-level* as regards the torture debates. After all, much more “practical” arguments around torture, often based on rational-choice and game-theoretical frameworks, have been circulating as well. (Koppl, 2006; Schiemann, 2012) Perhaps the most influential of these arguments has been that, as an information-gathering technique, torture simply works (Franklin, 2009; for a critical analysis see: Hajjar, 2009). In Guantanamo Bay, for example, psychologists assisted the military personnel in the interrogations of suspected terrorists, as members of so-called Behavioural Science Consultation Teams. (McCoy, 2012, pp. 82–84) Over the past years, it has become known that these psychologists offered their vast expertise to force detainees at Guantanamo into complete submission, for example via the induction of “learned helplessness”. (Risen, 2014, pp. 192–193)

What has been absent in these discussions around the effectiveness of torture is, obviously, a deeper concern with the moral dimension of “intentionally inflicting severe pain or suffering, whether physical or mental”, as Article 1(1) of the *Convention Against Torture* defines it. At most, interrogators and their political

superiors have been worried about legal liability at home or abroad, an issue that remains undecided until today. (Teitel, 2011, pp. 60–61) Since this paper has been primarily interested in the normative debate around the permissibility of torture, such “practical” arguments – does torture work, and if yes, how? – must be denounced as inherently problematic. In response to the objection, I would thus argue that the pragmatist defence indeed occurs on a meta-level compared to these practical arguments, but this is exactly where the contestation of the “torture works”-narrative must take place.

To conclude, this paper has shown that, on a particular reading of pragmatism, it is possible to defend a ban of torture. By distinguishing between constitutive and regulative rules, the paper has sought to offer support to those who find the absolutist response to the consequentialist challenge unsatisfying, but still want to uphold the torture prohibition. This line of defence is manifestly limited in its scope: it does not pretend to offer a justification for the wider web of social practices that together constitute the game we call “liberal democracy”. Whether and how this game could be justified is a question I have not ventured to answer here, even though I have hinted at Judith’s Shklar’s idea of putting cruelty first as a possible point of departure. Yet, if we consider ourselves committed to liberal democracy, it would be irresponsible to compel those with whom we hope to have a conversation to accept torture as an acceptable move in the conversation.

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Endnotes

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³ In line with Knight and Johnson, I use the term “consequentialism” here in the sense of “instrumentalism”. This use does not overlap with the technical meaning of consequentialism in moral philosophy, according to which it is individual conduct that ought to be assessed on the basis of results it produces.

⁴ Evidently, a more comprehensive approach to the torture prohibition would require engaging with (threshold) deontologists as well. I intend to do so in a forthcoming book manuscript.

⁵ Searle gives the example of a rule that stipulates that cars be driven on one side of the road – driving as such is possible on either side, but due the fact that people actually drive cars it is advisable to have a rule to regulate their behaviour. (Searle, 1998, pp. 123–124)

⁶ On why pragmatism is not (fully) compatible with rights-based liberalism see: (Sullivan, 2007, pp. 27–29) On a similar critique of the “rights-as-trumps” view see: (Pildes, 1998)

⁷ It has been pointed out to me, by a reviewer, that my discussion of the torture prohibition reveals affinities with the debate in IR around securitization: members of the so-called “Copenhagen School”, such as Ole Wæver and Barry Buzan, have for some time argued that securitizing certain issues involves depoliticizing them – by turning a societal problem into a security issue, it is removed from the democratic agenda. (see for example: Buzan, Wæver, and Wilde, 1998; Stritzel, 2007) Although I

cannot pursue these interesting affinities further, it should be noted that Michael Williams (2011) has extensively commented on the relationship between security studies and the “liberalism of fear”, suggesting that Shklar’s theory might – perhaps somewhat surprisingly – lend support to the Copenhagen School’s critical project.

⁸ A referee pointed out to me that this is not the same as saying that a dignified life cannot be lived in highly adverse conditions. Indeed, as the founder of logotherapy and Auschwitz survivor, Viktor Frankl, has suggested, even in the hell on earth that is the concentration camp one may search for meaning in life. (Frankl, 1997) Extraordinary individuals, such as Frankel, might be able to salvage their lives through their resilient spirit, but the same cannot be expected from every human being. What Shklar claims, however, is that a *society* prizing dignity as a foundational social value cannot be made compatible with the existence of widespread fear.

⁹ This has led some to argue that “by providing rhetorical resources to those who would, for example, create a network of secret prisons beyond the rule of law in which to torture anyone unfortunate enough to have crossed one of their informants, political philosophers [...] have foreseeably made not only each of the violations committed in those facilities easier but also facilitated the corruption of the various political institutions implicated in those practices” (Jubb and Kurtulmus, 2012, pp. 539–540).